Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & Anor

HIGH COURT (PENANG) — CIVIL SUIT NO 449 OF 1981
EDGAR JOSEPH JR SCJ
12 OCTOBER 1992

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Contract *— Damages — Interest — Building contract — Pre-trial and post-trial rate of interest — Civil Law Act 1956 s 11 — Rules of the High Court 1980 O 42 r 12*

Civil Procedure *— Pleadings — Departure from pleadings — Application to hold enquiry made after draft judgment read out — Whether application could be allowed*

Words and Phrases *— 'Waiver'*

Words and Phrases *— 'Acquiescence'*

The first defendant ('D1') entered into a joint-venture agreement ('the agreement') with a third party ('Tan'), whereby D1 agreed to purchase and Tan agreed to sell some land in Penang ('the land') for the construction of dwelling houses. Clause 22 of the agreement provided that 'this agreement shall be binding on the heirs, personal representatives, successors-in-title and assigns of the respective parties hereto'. It was also contended that there were two implied terms of the agreement, that: (i) D1 would carry out his work in a proper and workmanlike manner using materials of good quality and reasonably fit for their purpose; and (ii) Tan relied on the skill and judgment of D1 as a building contractor and upon his financial ability to carry out the works.

Fifteen months after the agreement was entered into, Tan sold the land to the plaintiff, his (Tan's) family company, subject to the rights and obligations under the agreement and D1 consented to the sale, on condition that all the rights and obligations of the parties under the agreement were to be assumed by the plaintiff and D1. Subsequently, D1 purported to assign ('the assignment') all his rights, title and interest under the agreement to the second defendant ('D2'), which was D1's family company. However, the plaintiff challenged the validity of the assignment and refused to have any dealings with D2, alleging that the relationship between the plaintiff and D2 had never been amicable and that the plaintiff had no confidence in D2 as a building contractor.

D1 had begun the construction work, but was unable to complete it, and the plaintiff alleged that: (i) under the agreement, D1 was liable to pay compensation at the rate of RM10 per day in respect of each of 15 uncompleted houses from January 1979; (ii) the construction work carried out by D1 was seriously defective and, as D1 had not carried out the required remedial works, he was in breach of contract; (iii) D1 did not have the financial ability to carry out his obligations under the agreement which was, in consequence, frustrated; (iv) the

purported assignment was not valid, and even if it was valid in law, it had been lawfully rescinded by the plaintiff, and D2 was thus liable to the plaintiff; and (v) it had lost the benefit of the agreement, ie the profits it would have received from the rental or sale of the houses. The plaintiff claimed: (a) a declaration that, on its true construction, the agreement was rescinded; (b) a declaration that, on the true construction of the agreement, D1 was not entitled to assign his right, title or interest under the agreement to D2 without the plaintiff's consent; and (c) damages, interest, and costs.

D1's defences were that: (i) the plaintif had failed to give vacant possession of the whole of the land until 3 April 1981, with the result that the 18-month construction period was to run from that date; (ii) the dispute had been compromised by a settlement agreement ('the settlement agreement') on terms that, on payment of RM250,000, the plaintiff had agreed to discharge D1 of all liabilities existing prior to 20 July 1982, the time for completion would be extended by two years from that date, and the suit herein discontinued; (iii) the plaintiff had no reasonable cause to terminate the agreement or, alternatively, the plaintiff was estopped by its conduct in entering into the settlement agreement and had thereby waived any alleged breach of the agreement by D1; and (iv) the assignment to D2 was valid, and thus the plaintiff had no cause of action against him. Alternatively, D1 said that the assignment was null, void and of no effect for total failure of consideration and had been rescinded. Two months after the settlement agreement was entered into, the receivers and managers of D2 obtained a court order ('the court order') whereby D2 was authorized to continue with the construction work.

By his counterclaim, D1 claimed: (i) damages for the lost chance of deriving a profit from the construction of the project, together with other damages, interest and costs; and (ii) specific performance of the agreement. In its defence, D2: (i) denied the alleged implied terms in the agreement; (ii) contended that the assignment by D1 was valid and that the plaintiff had been informed of it but had wrongfully prevented D2 from continuing with the construction work; (iii) said that the plaintiff had failed to deliver vacant possession of the land in accordance with the agreement; (iv) denied the plaintiff's allegations about lack of confidence and asserted that, as from January 1979, it had assumed all responsibilities for the project without objection from the plaintiff; and (v) said that the plaintiff had been aware that, as D2 was D1's family company, it was D2 which would be carrying out the building scheme under the agreement. D2 alleged that it had substantially performed its obligations and counterclaimed for specific performance of the agreement; an injunction restraining the plaintiff from preventing or interfering with the construction works; damages; interest; and costs.

In the action between the plaintiff and D2, the key issues before the court were: (i) whether the assignment from D1 to D2 was valid; and

(ii) if so, whether it was the plaintiff or D2 who was in breach of the agreement.

Held, dismissing both the plaintiff's claim and D1's counterclaim and allowing D2's counterclaim:

(1) It was obviously the intention of the parties, judged purely from the words appearing in cl 22, that both the parties to the agreement were to be at liberty to assign their right, title and interest under it without the need for consent by the other party. As the words of cl 22 were unmistakably clear and unambiguous, any attempt to introduce extrinsic or oral evidence in contradiction of cl 22 would be inadmissible under ss 91 and 92 of the Evidence Act 1950. Therefore, the testimony of the solicitor who prepared the joint-venture agreement, as to the interpretation of cl 22, must be disregarded.

(2) On the evidence, it was clear that Tan knew D1's modus operandi when entering into joint-venture agreements was to engage D2 to carry out the construction works and to raise the necessary finance. Furthermore, the parties' conduct following execution of the agreement reinforced the view that it was their intention that their right, title and interest thereunder were to be freely assignable.

(3) Even if, upon a proper construction of the agreement, the parties were not at liberty to assign their rights thereunder without the express consent of the other party, by their conduct, Tan, and therefore the plaintiff, had waived the condition against assignment or, alternatively, by their conduct, had acquiesced to D2 stepping into D1's shoes.

(4) The assignment was made for valuable consideration as the receipts for the consideration which had been paid to D1 in respect of the assignment were signed by D1's attorney ('DW2'), under a general power of attorney which had not been effectively revoked. By virtue of cl 26 of the power of attorney, consistently with s 161 of the Contracts Act 1950, for the notice of revocation to be effective, it has to be received by DW2. As DW2 had not received the notice of revocation, he was authorized to sign the receipts on behalf of D1 and D1 had no right to rescind the assignment.

(5) Although the plaintiff attempted to allege fraud, misrepresentation and manipulation of accounts against D2 by way of cross-examination of DW2, neither fraud nor misrepresentation had ever been alleged by the plaintiff in their pleadings. It is settled law that where it is sought to rely upon a plea based thereon, the allegations relating thereto must be pleaded and particularized, in which case, the onus lies upon the party making the allegations to prove the same beyond reasonable doubt. Therefore, the allegations made by way of cross-examination by counsel for the plaintiff should be dismissed.

(6) The settlement agreement had been overridden by the court order whereby D2 had been authorized to carry on the counstruction work. As an officer of the court, D1's counsel (who was also the plaintiff's solicitor in the matter of the settlement agreement) was under a duty to inform the plaintiff of the court order. Although the plaintiff did not know of the court order at the material time, the knowledge of their solicitor must be imputed to the plaintiff. As the plaintiff and D1 continued to deal with each other with a view to D1 carrying out the construction works notwithstanding the court order, a prima facie case of contempt of court was made out.

(7) As was admitted on behalf of the plaintiff, vacant possession was never given by the plaintiff as required under the agreement. It was perfectly obvious, therefore, that the plaintiff was in breach of contract from beginning to end and was wholly to blame for causing the construction work to grind to a halt. Moreover, by commencing work before vacant possession of the site was given, D1 had not intended to waive or release Tan and his successor-in-title, the plaintiff, from the obligation to provide vacant possession of the lands concerned within the time limited under the agreement. There was no waiver as contended for on behalf of the plaintiff because D1 never intended to release or not assert his right.

(8) The so-called admission contained in the settlement agreement, that D1 was in breach of the agreement for which the RM250,000 was to be paid by way of damages, was in no way binding upon D2 who was not a party to the settlement agreement.

(9) Section 42 of the Contract Act 1950, which provides that 'when the promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor' applied in favour of D1. The plaintiff's claims against D1 and D2 were, therefore, dismissed with costs. Similarly, D1's counterclaim against the plaintiff had no legal basis and was also dismissed but with no order as to costs.

(10) The evidence disclosed that D2 had put in a tremendous amount of work and labour and also expended considerable sums of money in discharge of its obligations under the agreement. There was, therefore, considerable justification for invoking the doctrine of substantial performance in favour of D2.

(11) The court has a discretion to order specific performance and decree damages in favour of a party, as land is always deemed to have a special value of loss which may not be adequately compensated by damages. In this case, an order for specific performance requiring the plaintiff to carry out the terms and conditions of the agreement and to permit D2, as assignee of D1, to carry out its obligations thereunder; and an injunction restraining the plaintiff from preventing or interfering with the construction work to be continued by D2, were allowed.

(12) The material date at which damages fell to be assessed was the date of the hearing, and D2 was entitled to actual damages of RM896,107.32 and consequential damages of RM4,868,027.14. Pursuant to s 11 of the Civil Law Act 1956, D2 was entitled to recover interest on the damages aforesaid at the rate of 8%pa from 1 January 1981 (the date on which the project would probably have been completed had vacant possession been given by the plaintiff in accordance with the agreement, with no interruption of work) to the date of judgment and, pursuant to O 42 r 12 of the Rules of the High Court 1980, further interest thereon at the aforesaid rate from the date of judgment to the date of payment.

(13) Counsel for the plaintiff's request that an enquiry as to damages be held, could not be allowed as the request had been made only after the draft judgment of the court had been read out. To have granted the request would have led to an unnecessary prolongation of a lengthy trial, with an increase in costs and would have meant giving the plaintiff a second opportunity to prove a point which it had failed to do at the trial. Furthermore, if the plaintiff were to be permitted to make further investigations and to call further evidence after the court had pronounced judgment on all issues before it, then the rules of procedure would become nugatory.

Per curiam:

(1) 'Waiver' is the abandonment of a right and is either express or implied; it may be implied from conduct which is inconsistent with the continuation of the right. A person who is entitled to the benefit of a stipulation in a contract may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waiver in this sense, depends upon consent and the fact that the other party had acted upon it is sufficient consideration.

(2) By definition, 'acquiescence' is used in two senses. Strictly, it implies that a person abstains from interfering while a violation of his rights is in progress or that he refrains from seeking redress when a violation of his rights, of which he did not know at the time, is brought to his notice.

[Bahasa Malaysia summary

Defendan pertama ('D1') telah mengikat suatu perjanjian usaha sama ('perjanjian itu') dengan pihak ketiga ('Tan'), di mana D1 bersetuju membeli dan Tan bersetuju menjual sebidang tanah di Pulau Pinang ('tanah itu') untuk pembinaan rumah kediaman. Fasal 22 perjanjian itu memperuntukkan bahawa 'this agreement shall be binding on the heirs, personal representatives, successors-in-title and assigns of the respective parties hereto'. Juga dinyatakan bahawa terdapat dua syarat tersirat dalam perjanjian itu, iaitu: (i) D1 akan menjalankan kerjanya

dalam cara yang sempurna dan baik buatannya dengan menggunakan bahan yang berkualiti baik dan layak untuk tujuannya; dan (ii) Tan bergantung kepada kemahiran dan pertimbangan D1 sebagai seorang kontraktor binaan dan atas keupayaan kewangannya untuk menjalankan kerja itu.

Lima belas bulan selepas perjanjian itu diikat, Tan menjual tanah itu kepada plaintif, iaitu syarikat yang dipunyai oleh keluarga Tan, tertakluk kepada hak dan obligasi di bawah perjanjian itu dan D1 telah memberi persetujuannya kepada penjualan itu, atas syarat bahawa semua hak dan obligasi pihak-pihak kepada perjanjian itu diambil alih oleh plaintif dan D1. Kemudiannya, D1 telah menyerahhakkan ('penyerahhakkan itu') kesemua hak, hakmilik dan kepentingannya di bawah perjanjian itu kepada defendan kedua ('D2'), iaitu syarikat yang dipunyai oleh keluarga D1. Tetapi plaintif telah mencabar keesahan penyerahhakkan itu dan enggan berurusan dengan D2, sambil mengatakan bahawa plaintif dan D2 tidak pernah bersahabatan dan plaintif tidak mempunyai keyakinan terhadap D2 sebagai kontraktor binaan.

D1 telah memulakan kerja pembinaan itu tetapi tidak dapat menyelesaikannya, dan plaintif menegaskan bahawa: (i) di bawah perjanjian itu, D1 kena membayar pampasan pada kadar RM10 sehari untuk setiap 15 buah rumah yang tidak disiapkan dari Januari 1979; (ii) kerja pembinaan yang dijalankan oleh D1 cacat teruk, dan oleh kerana D1 tidak menjalankan kerja pemulihan yang diperlukan, D1 telah memungkiri perjanjian itu; (iii) D1 tidak mempunyai keupayaan kewangan untuk memenuhi obligasinya di bawah perjanjian itu, dan akibatnya, perjanjian itu terkecewa; (iv) penyerahhakkan itu tidak sah, dan meskipun ia sah, ia telah dibatalkan dengan sah oleh plaintif, dan oleh itu D2 bertanggungan kepada plaintiff; dan (v) ia telah kehilangan faedah perjanjian itu, iaitu keuntungan yang dijangka akan diperolehinya daripada jualan atau penyewaan rumah tersebut. Plaintif menuntut: (a) suatu deklarasi bahawa, pada pentafsiran yang sebenar, perjanjian itu telah dibatalkan; (b) suatu deklarasi bahawa, pada pentafsiran sebenar perjanjian itu, D1 tidak berhak menyerahhak hak, hakmilik atau kepentingannya di bawah perjanjian itu kepada D2 tanpa persetujuan plaintif; dan (c) ganti rugi, bunga dan kos.

Pembelaan D1 adalah bahawa: (i) plaintif telah gagal memberi milikan kosong bagi keseluruhan tanah itu sehingga 3 April 1981, dengan akibat tempoh pembinaan 18 bulan itu patut dikira dari tarikh itu; (ii) pertikaian itu telah dikompromi melalui suatu perjanjian penyelesaian ('perjanjian penyelesaian itu') atas syarat bahawa, atas bayaran RM250,000, plaintif bersetuju melepaskan D1 daripada semua liabiliti yang wujud sebelum 20 Julai 1982, masa untuk menyiapkan pembinaan akan dilanjutkan selama dua tahun, dan tindakan ini diberhentikan; (iii) plaintif tidak mempunyai sebab yang wajar untuk menamatkan perjanjian itu, atau secara alternatif, plaintif diestop oleh kelakuannya, iaitu dengan mengikat perjanjian penyelesaian, dan dengan itu telah menepikan sebarang kemungkiran kontrak yang

dikatakan telah dilakukan oleh D1; dan (iv) penyerahhakkan kepada D2 adalah sah dan oleh itu, plaintif tidak mempunyai sebarang kausa tindakan terhadapnya. Secara alternatif, D1 berkata bahawa penyerahhakkan itu adalah batal dan tidak sah dan tidak berkesan kerana ketidakhadiran sebarang balasan dan telah dibatalkan. Dua bulan selepas perjanjian penyelesaian itu diikat, penerima dan pengurus D2 telah mendapatkan suatu perintah mahkamah ('perintah mahkamah itu') yang memberikuasa kepada D2 untuk meneruskan kerja pembinaan itu.

Melalui tuntutan balasnya, D1 menuntut: (i) ganti rugi untuk kehilangan peluang mendapat keuntungan daripada pembinaan projek itu, bersama dengan ganti rugi lain, faedah dan kos; dan (ii) pelaksanaan spesifik perjanjian itu. Dalam pembelaannya, D2: (i) menafikan syarat tersirat yang dikatakan terkandung dalam perjanjian itu; (ii) menegaskan bahawa penyerahhakkan oleh D1 adalah sah dan plaintif telah diberitahu mengenainya tetapi dengan salah telah menghalang D2 daripada meneruskan kerja pembinaan itu; (iii) berkata bahawa plaintif telah gagal menghantar-serahkan milikan kosong tanah itu mengikut perjanjian itu; (iv) menafikan penegasan plaintif tentang kekurangan keyakinan terhadapnya dan menegaskan bahawa, sejak Januari 1979, ia telah mengambil alih kesemua tanggungjawab untuk projek itu tanpa bantahan daripada plaintif; dan (v) berkata bahawa plaintif sedar bahawa, memandangkan bahawa D2 adalah sebuah syarikat yang dipunyai oleh D1, D2lah yang akan melaksanakan skim pembinaan di bawah perjanjian itu. D2 mengatakan bahawa ia telah menjalankan sebahagian besar obligasinya dan menuntut balas untuk pelaksanaan spesifik perjanjian itu; suatu injunksi menahan plaintif daripada menghalang atau bercampur tangan dengan kerja pembinaan; ganti rugi; faedah; dan kos.

Dalam tindakan di antara plaintif dan D2, isu utama di hadapan mahkamah adalah: (i) sama ada penyerahhakkan daripada D1 ke D2 adalah sah; dan (ii) jika ianya sah, sama ada plaintif atau D2 yang memungkiri perjanjian itu.

Diputuskan, menolak tuntutan plaintif dan tuntutan balas D1 dan membenarkan tuntutan balas D2:

(1) Adalah jelas bahawa tujuan pihak, memandangkan kepada perkataan dalam fasal 22 sahaja, ialah supaya kedua-dua pihak kepada perjanjian itu bebas menyerahhak hak, hakmilik dan kepentingan mereka di bawahnya tanpa memerlukan persetujuan pihak yang lain. Oleh kerana perkataan dalam fasal 22 itu jelas dan tidak bersifat taksa, sebarang percubaan untuk memperkenalkan keterangan ekstrinsik atau lisan untuk menyangkal fasal 22 tidak boleh diterima di bawah ss 91 dan 92 Akta Keterangan 1950. Oleh itu, testimoni peguam yang telah menyediakan perjanjian itu mengenai tafsiran fasal 22, mesti tidak diendahkan.

(2) Berdasarkan keterangan, adalah jelas bahawa Tan tahu mengenai modus operandi D1 apabila mengikat perjanjian usaha sama adalah untuk mengambil D2 untuk melaksanakan kerja pembinaan dan mendapatkan kewangan yang diperlukan. Tambahan pula, kelakuan pihak-pihak berikutan penyempurnaan perjanjian itu menguatkan lagi pendapat bahawa tujuan mereka ialah supaya hak, hakmilik dan kepentingan mereka di bawah perjanjian itu boleh diserahhak dengan bebas.

(3) Walaupun pada pentafsiran perjanjian itu yang betul, pihak tersebut tidak bebas menyerahhak hak mereka di bawahnya tanpa persetujuan nyata pihak lain, Tan dan oleh itu, plaintif, melalui kelakuan mereka telah menepikan syarat yang melarang penyerahhakkan, atau secara alternatif, melalui kelakuan mereka, mereka telah mengakuies kepada D2 mengambil tempat D1.

(4) Penyerahhakkan itu telah dibuat untuk balasan bernilai kerana resit untuk balasan yang dibayar kepada D1 untuk penyerahhakkan itu telah ditandatangani oleh wakil D1 ('DW2'), di bawah suatu kuasa wakil am yang tidak dibatalkan secara berkesan. Mengikut fasal 26 surat kuasa wakil itu, selaras dengan s 161 Akta Kontrak 1950, supaya sesuatu notis pembatalan itu berkesan, ia mesti diterima oleh DW2. Oleh kerana DW2 tidak menerima notis pembatalan itu, beliau diberikuasa menandatangani resit itu bagi pihak D1 dan D1 tidak berhak membatal penyerahhakkan itu.

(5) Walaupun plaintif cuba mendakwa bahawa terdapat fraud, salah nyataan dan manipulasi akaun oleh D2 melalui pemeriksaan balas DW2, kedua-dua fraud atau salah nyataan tidak pernah didakwa oleh plaintif dalam plidingnya. Adalah undang-undang mantap bahawa apabila sesuatu percubaan dibuat untuk bergantung kepada sesuatu pli yang berdasarkan fraud dan salah nyataan, dakwaan yang berhubungan dengannya mesti dijadikan pli dan diperincikan, dan dalam keadaan sedemikian, beban membukti terletak pada pihak yang mendakwa sedemikian untuk membukti melampaui keraguan yang munasabah. Oleh itu, pendakwaan yang dibuat melalui pemeriksaan balas oleh peguambela plaintif mesti diketepikan.

(6) Perjanjian penyelesaian itu telah diatasi oleh perintah mahkamah di mana D2 telah diberikuasa untuk meneruskan kerja pembinaan. Sebagai seorang pegawai mahkamah, peguambela D1 (yang juga merupakan peguamcara plaintif dalam perkara perjanjian penyelesaian itu) mempunyai kewajipan untuk memberitahu plaintif tentang perintah mahkamah itu. Walaupun plaintif tidak mengetahui tentang perintah mahkamah itu pada masa material, pengetahuan peguamcara mereka mesti dikaitkan kepada plaintif. Oleh kerana plaintif dan D1 terus berurusan dengan satu sama lain dengan tujuan bahawa D1 akan meneruskan kerja pembinaan meskipun terdapat perintah

mahkamah itu, suatu kes penghinaan mahkamah yang prima facie telah dibuktikan.

(7) Seperti yang diperakui bagi pihak plaintif, milikan kosong tidak diberikan oleh plaintif seperti yang dikehendaki di bawah perjanjian itu. Adalah jelas bahawa plaintif telah memungkiri perjanjian dari awal hingga akhir dan patut dipersalahkan sama sekali kerana menyebabkan kerja pembinaan itu dihentikan. Lagipun, dengan memulakan kerja pembinaan sebelum milikan kosong tanah itu diberikan, D1 tidak bertujuan untuk menepikan atau melepaskan Tan dan pengganti haknya, iaitu plaintif, daripada obligasi memberi milikan kosong tanah itu dalam had masa yang ditetapkan oleh perjanjian itu. Tidak ada penepian yang dikatakan bagi pihak plaintif kerana D1 tidak bertujuan melepaskan atau tidak menegaskan haknya.

(8) Pengakuan yang kononnya terkandung dalam perjanjian penyelesaian itu, bahawa D1 telah memungkiri perjanjian di mana RM250,000 sepatutnya dibayar sebagai ganti rugi, tidak mengikat D2 yang bukan pihak kepada perjanjian penyelesaian itu.

(9) Seksyen 42 Akta Kontrak 1950, yang memperuntukkan bahawa, 'When the promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor', terpakai untuk faedah D1. Oleh itu, tuntutan plaintif terhadap D1 dan D2 ditolak dengan kos. Begitu juga, tuntutan balas D1 terhadap plaintif tidak mempunyai asas undang-undang dan juga ditolak tetapi tanpa perintah mengenai kos.

(10) Keterangan mendedahkan bahawa D2 telah bekerja keras dan membelanjakan jumlah wang yang besar dalam melaksanakan obligasinya di bawah perjanjian itu. Oleh itu, terdapat justifikasi yang besar untuk menggunakan doktrin pelaksanaan substantial untuk faedah D2.

(11) Mahkamah mempunyai budi bicara untuk memerintahkan pelaksanaan spesifik dan mendekri ganti rugi untuk faedah sesuatu pihak, kerana tanah sentiasa didapati mempunyai suatu nilai kerugian khas yang mungkin tidak dapat dipampas dengan mencukupi oleh ganti rugi. Dalam kes ini, suatu perintah pelaksanaan spesifik yang menghendaki supaya plaintif melaksanakan terma dan syarat perjanjian itu dan membenarkan D2, sebagai pemegang serahhak D1, untuk menjalankan obligasinya di bawahnya; dan suatu injunksi untuk menahan plaintif daripada menghalang atau bercampur tangan dalam kerja pembinaan, dibenarkan.

(12) Tarikh material dari mana ganti rugi ditaksirkan adalah tarikh perbicaraan, dan D2 berhak menerima RM896,107.32 sebagai ganti rugi sebenar dan RM4,868,027.14 sebagai ganti rugi berbangkit. Mengikut s 11 Akta Undang-Undang Sivil 1956, D2 berhak mendapat faedah ke atas ganti rugi tersebut pada kadar 8% setahun dari 1 Januari 1981 (tarikh bila projek itu

dijangka akan disiapkan jika milikan kosong telah diberikan oleh plaintif menurut perjanjian itu, tanpa gangguan kerja) sehingga tarikh penghakiman dan, mengikut A 42 k 12 Kaedah-Kaedah Mahkamah Tinggi 1980, faedah selanjutnya pada kadar tersebut dari tarikh penghakiman sehingga tarikh pembayaran.

(13) Permintaan peguambela plaintif supaya suatu siasatan mengenai ganti rugi diadakan, tidak boleh dibenarkan kerana permintaan itu hanya dibuat selepas penghakiman draf mahkamah telah dibacakan. Jika permintaan itu dibenarkan, ia akan memanjangkan lagi perbicaraan yang sudahpun panjang itu, dengan kenaikan kos, dan ini akan memberi plaintif peluang kedua untuk membuktikan suatu perkara yang telah gagal dibuktikan pada perbicaraan. Tambahan pula, jika plaintif dibenarkan membuat siasatan selanjutnya dan memanggil keterangan selanjutnya selepas mahkamah telah melafazkan keputusannya ke atas semua isu di hadapannya, maka kaedah prosedur akan dijadikan tidak berguna.

Per curiam:

(1) 'Penepian' merupakan pengguguran sesuatu hak dan ia adalah nyata atau tersirat; ia boleh disirat daripada kelakuan yang tidak konsisten dengan penerusan hak itu. Seseorang yang berhak menikmati faedah sesuatu syarat dalam suatu kontrak boleh menepikannya, dan membenarkan kontrak atau transaksi itu berjalan seperti syarat atau peruntukan itu tidak wujud. Penepian mengikut erti ini, bergantung kepada persetujuan dan fakta bahawa pihak yang lain itu telah bertindak ke atasnya adalah balasan yang mencukupi.

(2) Mengikut tafsirannya, 'akuiesens' boleh digunakan dalam dua erti. Sebenarnya, ia membayangkan bahawa seseorang itu menahan diri daripada bercampur tangan semasa suatu pelanggaran haknya sedang berlaku atau beliau tidak menuntut pembetulan apabila pelanggaran haknya, yang tidak diketahuinya pada masa itu, dibawa kepada pengetahuannya.]

[*Editorial Note*: The plaintiff has appealed to the Supreme Court vide Civil Appeal No 02–489–92.]

Notes

For cases on waiver of contractual terms, see 3 *Mallal's Digest* (4th Ed) paras 1039, 1633–1638.

For cases on contempt of court, see 2 *Mallal's Digest* (4th Ed) paras 558–566.

For cases on standard of proof for fraud in a civil action, see 2 *Mallal's Digest* (4th Ed) para 1004.

For cases on damages, see 3 *Mallal's Digest* (4th Ed) paras 1035–1038.

For cases on interest on damages, see 2 *Mallal's Digest* (4th Ed) paras 1157–1159, 1169–1171; 3 *Mallal's Digest* (4th Ed) para 1035.
For cases on departure from pleadings, see 2 *Mallal's Digest* (4th Ed) paras 1724–1726.
For cases on construction of terms of building contracts, see 3 *Mallal's Digest* (4th Ed) paras 901, 930–932.
For cases on specific performance, see 3 *Mallal's Digest* (4th Ed) paras 1051–1052, 1485–1488, 1496, 1521, 1523–1524, 1526–1528.
For cases on performance of promise by a third person, see 3 *Mallal's Digest* (4th Ed) para 1479.
For cases on admissibility of oral evidence in construing terms of contracts, see 3 *Mallal's Digest* (4th Ed) para 1581–1585.
For cases on duties of a solicitor, see 9 *Mallal's Digest* (4th Ed) para 1529.

Cases referred to

1 *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd* [1903] AC 414 (folld)
2 *Prenn v Simmonds* [1971] 1 WLR 1381; [1971] 3 All ER 237 (folld)
3 *Plantation Agencies Sdn Bhd v Haji Ariffin bin Haji Ismail* [1978] 1 MLJ 219 (refd)
4 *Commissioners of Inland Revenue v Raphael & Ors* [1935] AC 96 (refd)
5 *Reardon Smith Line Ltd v Hansen-Tangen* [1976] 1 WLR 989; [1976] 3 All ER 570; [1976] 2 Lloyd's Rep 60 (refd)
6 *Keene v Biscoe* (1878) 8 Ch D 201 (refd)
7 *Selwyn v Garfit* (1888) 38 Ch D 273 (refd)
8 *Re Stokoe, ex p Moore* [1876] 2 Ch D 802 (refd)
9 *Duke of Leeds v Earl of Amherst* (1846) 2 Ph 117 (refd)
10 *Saminathan v Pappa* [1981] 1 MLJ 121 (refd)
11 *Lee You Sin v Chong Ngo Khoon* [1982] 2 MLJ 15 (refd)
12 *Ong Heok & Anor v Ooi Bee Tat & Ors* [1982] 2 MLJ 326 (refd)
13 *Doshi v Yeoh Tiong Lay* [1975] 1 MLJ 85 (folld)
14 *Craine v Colonial Mutual Fire Insurance Co Ltd* (1920) 28 CLR 305; 26 ALR 326 (refd)
15 *Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360 (refd)
16 *Letchumi Ammal v Nam Fong Housing Sdn Bhd* [1982] 2 MLJ 19 (folld)
17 *Oon Hock Lai & Anor v Lee Kok Leong* [1990] 1 CLJ 951 (folld)
18 *Jania Beevi v Govindaswami* AIR 1967 Mad 369 (refd)
19 *Kow Lup Piow & Ors v Lee Soh Hua* [1983] 1 MLJ 304 (folld)
20 *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 (folld)
21 *Johnson v Agnew* [1980] AC 367; [1979] 1 All ER 883; [1979] 2 WLR 487 (folld)
22 *Radford v De Froberville* [1977] 1 WLR 1262; [1978] 1 All ER 33 (folld)

A 23 *Hadley v Baxendale* (1854) 9 Ex 341 (folld)
24 *Victoria Laundry (Windsor) Ltd v Newman Industries Coulson Ltd* [1949] 2 KB 528; [1949] 1 All ER 997 (folld)
25 *Wraight Ltd v PH & T (Holdings) Ltd* (1968) 13 BLR 27 (folld)
26 *London, Chatham & Dover Railway Co v South Eastern Railway Co* [1893] AC 429 (refd)
B 27 *Lim Yak Hua v Eastern & Oriental Hotel [1951] Sdn Bhd* [1988] 3 MLJ 151 (refd)

Legislation referred to
Civil Law Act 1956 s 11
C Contracts Act 1950 s 42
Specific Relief Act 1950 ss 11, 18, 20 21, 22

Lim Kean Siew (*Dr Jagjit Singh Sidhu* with him) (*Lim Kean Siew & Co*) for the plaintiff.
D *Yap Chye Choon* (*Yap Chye Choon & Co*) for the first defendant.
NG Sivanandhan (*Karen Lim* with him) (*Presgrave & Matthews*) for the second defendant.

Edgar Joseph Jr SCJ: By an agreement in writing dated 20 May 1977, ('the joint-venture agreement') entered into by a certain Tan Ah Chim, of E the one part, and a certain Ooi Bee Tat, the first defendant ('D1') of the other part, D1 had agreed to purchase and Tan Ah Chim had agreed to sell the land comprised in Holding No 70, Town Subdivision 5, North East District Penang ('the land'), for the construction of dwelling houses described therein and subject to the terms and conditions set out therein.
F More particularly, the principal terms and conditions of the joint-venture agreement, so far as material to this suit, were these:

(1) part of the purchase price of the land was to consist of dwelling houses to be erected thereon by D1 for the benefit of Tan Ah Chim (cll 2 and 11);
G (2) the building scheme on the land was to be carried out in two phases (cl 9);
(3) D1 had undertaken to complete the construction of the dwelling houses and obtain occupation certificates in respect thereof within 18 months of being given possession of the site (cl 11); and
(4) if D1 were to be in default of his obligations under cl 11, then he was to incur liability to compensate Tan Ah Chim at the rate of RM10 per H day in respect of each dwelling house and, if after a period of 18 months from the date of such default, D1 were to fail to obtain the required occupation certificates, Tan Ah Chim was to have the right to rescind the agreement (cl 13).

In addition, it was contended for the plaintiff that the following terms were I to be implied under the joint-venture agreement:

(1) that D1 would carry out his work in a proper and workmanlike manner using materials of good quality and reasonably fit for their purpose; and

(2) that Tan Ah Chim relied on the skill and judgment of D1 as a building contractor and upon his financial ability to carry out the works. A

Some 15 months after the execution of the joint-venture agreement, more particularly, on 27 August 1978, Tan Ah Chim had, by an agreement in writing dated the same date, sold the land to the plaintiff, Tan Ah Chim & Sons Sdn Bhd, a family company of which Tan Ah Chim was the founder, B subject to the rights and obligations under the joint-venture agreement, and D1 had, by a letter dated 26 May 1979, consented to the sale, on condition that all the rights and obligations of the parties under the joint-venture agreement were to be assumed by the plaintiff and D1.

Pursuant to the joint-venture agreement, D1 had commenced construction work on the land but, as events turned out, he was unable to complete the C same.

In consequence, the plaintiff alleged that D1 was, by virtue of the joint-venture agreement, liable to pay to the plaintiff compensation at the rate of RM10 per day in respect of each dwelling house and, as 15 dwelling houses were involved, this would amount to RM150 per day from January 1979. D

The plaintiff further alleged that the construction work carried out by D1 was seriously defective in that:

(a) the structures were not built according to the specifications of the contract; and
(b) the materials used and the workmanship were of inferior quality, E

and although D1 had been notified of the same by a letter in writing dated 22 January 1979 from the consultant engineer concerned, he had not carried out any remedial works and that, in consequence, he was in breach of contract.

Additionally, the plaintiff alleged that D1 did not possess the wherewithal F or the financial means to carry out his obligations under the joint-venture agreement and, in consequence, the same was frustrated.

It would be pertinent, at this stage, to refer to another event, namely, the entry on the scene of the second defendant, Ooi Bee Tat & Sons Sdn Bhd ('D2'), it being the family company of which D1 was the founder. This G requires me to refer to an assignment agreement in writing dated 14 June 1979 ('the assignment agreement'), whereby D1 purported to assign all his rights, title and interest under the joint-venture agreement to D2.

D2's solicitors had, by a letter dated 1 October 1979, notified the plaintiff of the assignment agreement, but the plaintiff challenged the validity of the same and refused to have any dealings with D2 and also took H the position that Tan Ah Chim had entered into the joint-venture agreement with D1 because of the latter's skill, experience and judgment as a building contractor and the friendly relations which subsisted between them. Moreover, it was said that the relationship between the plaintiff and D2 had never been amicable and that the plaintiff had no confidence in the I competence of D2 as a building contractor.

In any event, it was contended on behalf of the plaintiff that, if the assignment agreement were valid in law, the joint-venture agreement had

been lawfully rescinded by the plaintiff for the reasons stated, and so, on this further ground also, D2 was liable to the plaintiff.

In particular, the plaintiff alleged that it had lost the benefit of the joint-venture agreement, that is to say, the profits it would have received from the rental or sale of the dwelling houses it would have been entitled to under the same.

In the circumstances, the plaintiff prayed for judgment against D1 and D2 as follows:

(a) a declaration that on the true construction of the joint-venture agreement, it was recinded;
(b) a declaration that on the true construction of the joint-venture agreement and the events which had happened in law, D1 was not entitled to convey or transfer to D2 his rights, title or interest in the joint-venture agreement without the consent of the plaintiff;
(c) damages;
(d) interest; and
(e) costs.

I must now turn to consider the case for D1.

The primary defence advanced on behalf of D1 was that by cl 8 of the joint-venture agreement, the plaintiff was obliged to deliver vacant possession of the land and that construction work thereon would be carried out in two phases as indicated in the layout plan as follows:

> The building scheme on the said land shall be carried out and developed in two phases as shown in ink shading on the layout plan:-
>
> (i) within 18 months of vacant possession being obtained of the land comprised in phase I, two type A houses, 28 type B houses and six type C houses shall be erected and completed for occupation; and
> (ii) within 18 months of vacant possession being obtained of the land comprised in phase II and provided all the houses comprised in phase I shall have been completed, the remaining nine type A houses shall be erected and completed for occupation.

Yet, it was said, the plaintiff had failed to give D1 vacant possession of the whole of the land. In particular, it was said, at the time D1 was given possession of the land, there were eight squatters in occupation thereof, and it was not until 3 April 1981 that vacant possession was in fact given, with the result that time to commence construction work began to run only with effect from that date and so the date for completion was to be on or before 3 October 1982.

A further defence advanced on behalf of D1 was that it had, on 20 July 1982, been agreed between him and the plaintiff that:

(1) in consideration of the payment of RM250,000, the plaintiff had agreed to discharge all liabilities outstanding against D1 prior to 20 July 1982, and that time for completion would be extended by two years with effect from 20 July 1982;

(2) the plaintiff would forward to D1 a resolution of the board of directors of the plaintiff, evidencing the said extension of time; and
(3) whereupon, the plaintiff would forthwith discontinue the suit herein.

Yet, it was said, the plaintiff never forwarded to D1 the said resolution nor discontinued the suit, although D1 was, at all material times, ready, willing and able to carry out his obligations under the joint-venture agreement and indeed, had been prevented from so doing by the wilful default of the plaintiff.

In these circumstances, it was contended on behalf of D1, that the plaintiff had no reasonable cause to terminate the joint-venture agreement in the manner it did, by instituting this suit, and in the alternative, that even if it had, the plaintiff had, by it own subsequent conduct in entering into the agreement for extension time of 20 July 1982, waived any alleged breach of the joint-venture agreement by D1, thereby leaving it still subsisting, and/or the plaintiff was estopped by its conduct from raising the complaints appearing in the amended statement of claim.

Yet another defence advanced on behalf of D1 was that he had, on 14 June 1979, assigned all his rights, title and interest under the joint-venture agreement to D2, in consideration of the payment to him of RM60,000, and that if the assignment agreement were good in law, the plaintiff had no cause of action against him. But, it was said that the assignment agreement was null, void and of no effect for total failure of consideration, and so was rescinded on 13 February 1980.

By his counterclaim, D1 claimed damages for loss of the chance of deriving a profit from the construction of 25 units of double storey terrace houses, seven units of double storey shophouses and 11 units of double storey detached houses on the land, particulars whereof are as follows:

(1) Potential income	RM5,494,000
(2) Estimated capital expenditure	RM2,889,632
(3) Loss of potential profit	RM2,604,368

D1 also claimed specific performance of the joint-venture agreement and compensation for delay caused by the plaintiff's breach of its obligations thereunder.

Lastly, D1 claimed interest on compensation, and damages at the rate of 8%pa and costs of the action.

By its reply and defence to counterclaim, the plaintiff joined issue with D1 upon his defence and went on to say that the joint-venture agreement had been rescinded and therefore in law the parties were precluded from agreeing to extend time for completion. The claim for loss of profits was denied and D1 was put to strict proof.

I must next turn to consider the defence advanced on behalf of D2.

In the first place, the implied terms alleged in the statement of claim (reproduced above) were denied.

In the second place, like D1, D2 also alleged that, contrary to its obligations under the joint-venture agreement, the plaintiff had failed to deliver vacant possession of the land.

More particularly, the plaintiff's allegations that Tan Ah Chim had entered into the joint-venture agreement with D1 by reason of D1's skill, experience and judgment as a building contractor and the amicable relationship which subsisted between them *whereas* the relationship between the plaintiff and D2 had never been amicable, and that the plaintiff had no confidence in D2 as a building contractor, were strongly refuted by D2, it being contended:

(1) that the plaintiff was well aware, right from the start, that as D2 was a family company primarily engaged in the construction field, either as builders or contractors, and whose managing director was D1, the building scheme under the joint-venture agreement would be carried out by D2;

(2) that the plaintiff had expressly or impliedly agreed to allow D2 to carry out the obligations of D1 under the joint-venture agreement;

(3) that as from January 1979, D2 had assumed all responsibilities in respect of the building scheme on the land and, although the plaintiff well knew about this, it raised no objection; and

(4) that in carrying out the construction works aforesaid, D2 had incurred considerable expenditure, more particularly, it had incurred expenses amounting to approximately RM440,772 in the construction of 16 terrace houses, 50% of seven shophouses and footings of two detached houses, up to the time it had been wrongfully prevented by servants or agents of the plaintiff from proceeding with the said works, and so was entitled to rely on the doctrine of substantial performance.

By reason of the matters hereinbefore mentioned, it was contended by D2 that the plaintiff's claims were barred by waiver, laches, acquiescence, and estoppel, so that it was precluded from rescinding the joint-venture agreement.

It was further contended by D2 that, by the assignment agreement, D1 had formally and unconditionally assigned all his right, title and interest in the joint-venture agreement to D2, and that the plaintiff had been informed of this and a copy of the same had actually been sent to its solicitors on 1 October 1979, yet the plaintiff had not only challenged the legal validity of the assignment agreement but also wrongfully prevented D2 from continuing with the construction work.

In answer to D1's contention that the assignment agreement was bad in law for total failure of consideration, D2 said, in effect, that the contention was untenable, as the consideration of RM60,000 stated therein had in fact been paid in full and so D1's attempt to rescind the same was ineffective, and consequently, could not be relied upon by the plaintiff to defeat the right, title and interest under the joint-venture agreement, which had accrued to D2.

By reason of the matters aforesaid, D2 contended that it was not it, but the plaintiff, which was in breach of the joint-venture agreement and thus had caused considerable losses, damage and hardship to it.

In these circumstances, D2, by way of counterclaim, prayed for judgment against the plaintiff as follows:

(1) specific performance of the joint-venture agreement, in particular, that it be ordered carry out its obligations under the same, including allowing D2, as successor-in-title and/or assignee of D1, to carry out its obligations and exercise its rights under the same;
(2) an injunction restraining the plaintiff, by itself, its servants or agents, from preventing or interfering with the building and construction works to be continued by D2, its servants or agents;
(3) actual and consequential damages;
(4) interest; and
(5) costs.

It would be more convenient if I consider the plaintiff's case against D2 first, before considering its case against D1.

In my view, the *key issues*, in so far as the plaintiff and D2 are concerned, are twofold, namely:

(1) whether there was a valid assignment of the joint-venture agreement from D1 to D2; and
(2) if so, whether it was the plaintiff or D2 which was in breach of the joint-venture agreement.

As to question (1)

By cl 22 of the joint-venture agreement, it was expressly provided that 'this agreement shall be binding on the heirs, personal representatives, successors-in-title and assigns of the respective parties hereto'.

I accept that this may well be an unusual clause to find in a joint-venture agreement in the construction field where subjective considerations relating to the contractor and the employer can be most material; yet the parties deliberately chose to insert it. And, lest it be forgotten, this was an agreement drawn up by a solicitor, Mr Gan Teik Chee. It is obvious, therefore, that it was the intention of the parties, judged purely from the words appearing in cl 22, that both the parties to the joint-venture agreement, namely, Tan Ah Chim and D1, were to be at liberty to assign their right, title and interest under it without the need for consent by the other party. (See *Tolhurst v Associates Portland Cement Manufacturers (1900) Ltd*,[1] per Halbury LC at pp 416; per Lord Macnaghten at p 420; and per Lord Lindley at p 423.)

When, as here, the words of cl 22 are unmistakably clear and unambiguous, any attempt to introduce extrinsic or oral evidence in flat contradiction of cl 22 would be inadmissible under ss 91 and 92 of the Evidence Act 1950 and therefore, any submissions founded on such inadmissible evidence would be totally untenable. As Lord Wilberforce said in *Prenn v Simmonds*:[2] 'In my opinion, then, evidence of negotiations, or of the parties intentions, and a fortiori, of Dr Simonds' intentions, ought not to be received'. In this context, the case of *Plantation Agencies Sdn Bhd v Haji Ariffin bin Haji Ismail*[3] also merits reading. It follows, that the testimony

A of the solicitor who prepared the joint-venture agreement, as to the interpretation of cl 22, must be disregarded.

But, as Lord Wright put it in *Commissioners of Inland Revenue v Raphael & Ors*[4] (at p 143):

> The words actually used must no doubt be construed with reference to the facts
B known to the parties and in contemplation of which the parties must be deemed to have used them; such facts may be proved by extrinsic evidence or appear in recitals ...

So also, in *Reardon Smith Line Ltd v Hansen-Tangen*[5] Lord Wilberforce said [at p 574]:

C > No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as 'the surrounding circumstances' but this phrase is imprecise, it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background,
D > the context, the market in which the parties are operating.

He continued:

> ... what the court must do must be to place itself in thought in the same factual matrix as that in which the parties were.

E For reasons which will appear later in this judgment, I am satisfied that at the time he entered into the joint-venture agreement, Tan Ah Chim knew that the modus operandi of D1 when entering into agreements of that kind was not only to engage D2 to carry out the building construction work, but also to rely on D2 to raise the necessary finance by charging its land to
F banks from time to time. This, in my view, would explain why cl 22 — perhaps an unusual clause in a building contract — was inserted.

Moreover, as it happens, the conduct of the parties following the execution of the joint-venture agreement reinforces the view that it was their intention that their right, title and interest thereunder were to be freely assignable.

We know, for example, that under the joint-venture agreement, the
G vendor, Tan Ah Chim, had, without the consent of the purchaser D1, entered into an agreement dated 27 August 1978 with his family company, the plaintiff, whereby all his rights, title and interest thereunder had passed to the plaintiff. Pursuant thereto, Tan Ah Chim had transferred the land to the plaintiff and had, through his solicitors, Messrs Gan Teik Chee & Ho,
H by letter dated 22 May 1979, merely informed D1 of the same without in any way seeking the latter's consent thereto. This strongly suggests that Tan Ah Chim, acting no doubt on advice from his solicitors, himself recognized that regard being had to the provisions of cl 22, he was free to transfer the land, which was the subject matter of the joint-venture agreement, without the consent of D1.

I In the same way, I am satisfied upon the evidence before me, that Tan Ah Chim, and thereafter the plaintiff, were aware that building works on what was known as the Green Lane Project (within the building scheme concerned), which fell within the scope of the joint-venture agreement,

were being carried out by D2 ever since August 1977. Indeed, by a letter dated 8 January 1979 (AB1 at p 32), signed by D1, addressed to, inter alia, Tan Ah Chim, with copies, inter alia, to Messrs Gan Teik Chee & Ho, D1 gave formal notice of his intention to assign all his rights and obligations under the joint-venture agreement to D2. A

In reply, Messrs Gan Teik Chee & Ho, by a letter dated 8 February 1979 (AB1 at p 45), merely asked for the names of the shareholders of D2, their respective shareholdings and their relationship to D1, adding that 'Mr Tan Ah Chim is anxious to ascertain whether real property gains tax is payable'. Be it noted, nowhere in the letter was there anything indicating any objection to the assignment nor, for that matter, did the plaintiff raise any objection when two of their directors had been informed by D2, by letter dated 15 February 1979, that it (D2) would continue with the construction works on the land. B C

Some three weeks before Messrs Gan Teik Chee & Ho's letter dated 8 January 1979, by a circular resolution dated 17 January 1979, signed by all the directors of D2, including D1, it was resolved that D2 should completely take over the rights and obligations of D1 under the joint-venture agreement. D

Going back a little more, the events immediately preceding the signing of the assignment agreement may be worth mentioning. On 11 November 1978, D1 had resigned as the permanent managing director and his eldest son, Ooi Kim Keat (DW2), succeeded him as managing director. Apparently, the reason for this, according to Ooi Kim Keat, was that D1 had wanted him to learn to manage D2 and also because D1 was no longer interested in the business of D2. E

The first indication of objection being taken by the plaintiff to the alleged assignment was by letter dated 11 October 1979 (AB1 at p 112), with no reason for the objection being assigned. It was said that the objection was the result of instigation on the part of D1, who had by now fallen apart badly with members of his family who were on the board of D2 (including his wife, Ong Heok, and his eldest son, Ooi Kim Keat, DW2) on account of personal family reasons. F

The plaintiff's letter of 11 October 1979 prompted the solicitors for D2 to write to the plaintiff, reminding it that the joint-venture agreement permitted assignment and asking for reasons for the objection to the assignment. No reply having been received to this letter, D2's solicitors wrote another letter dated 29 November 1979 to the plaintiff (AB1 at p 117), once again drawing their attention to the assignment and asking for their approval to it, at the same time offering them various inducements, for example, an undertaking to pay compensation to squatters on the land and to give an indemnity in respect of any claims D1 might have against it arising from liability incurred for delay in the completion of works. G H

The plaintiff's solicitors then replied by letter dated 11 December 1979 (AB1 at p 118), stating that the plaintiff could not consider the request for approval of the assignment until their client had discussed the matter with D1 personally. I

A subsequent letter by the solicitors for the plaintiff, dated 17 December 1979, addressed to D1 (AB1 at p 120), made it clear that it was the confirmation of D1 to the assignment which the plaintiff was concerned about, for it ended with the following two paras:

> The purported assignment obviously cannot be accepted without your unequivocal consent as there was previous disclaimer by you of a similar assignment.
>
> It would be in the interest of all parties to settle the outstanding disputes so that construction of the eight houses above-mentioned can be completed and the building scheme proceeded with without further delay.

It was obvious from the evidence before me, that D1 had disclaimed the assignment because he alleged that he had not been paid the consideration of RM60,000 mentioned therein. This allegation by D1 must, however, be tested against certain background facts particularized by counsel for D2 in his written submission at p 27, concerning the course of dealings between D1 and D2 in the construction field, including the financial assistance rendered by D2 to D1, by raising loans from banks upon the security of charges over D2's lands. It was said that there had been various building projects carried out by D2, upon the request of D1, and for his benefit, in respect of which D1 had collected milions of dollars from purchasers, with the result that D1 owed and still owes substantial sums of money to D2.

In particular, it was said that upon D1's own admission, as at 30 September 1978, D1 owed to D2 the sum of RM460,822 and that, as at 31 December 1978, D1 owed to D2 the sum of RM375,822. Having regard to the evidence, I accept that the admissions by D1 are true.

To return to the specific issue as to whether D2 had paid to D1 the consideration of RM60,000 referred to in the assignment agreement, it is true that, at first glance, it appears from the bank statements that the RM60,000 was not paid by D2 to D1, but reflection reveals that it was in fact paid, as evidenced by the relevant entries in the books of account of D2, which entries I find were made upon the instructions of D1, as well as the oral evidence thereon of Ooi Kim Keat, whose testimony on this point I accept. These entries reveal that in the books of D2, in respect of the account of D1, credit had been given to D1, thereby reducing his total outstandings to D2 in the manner particularized at pp 29–30 of the written submission of counsel for D2.

In this context, an issue arose as to whether Ooi Kim Keat had the authority to sign the second of the two receipts dated 26 January 1979 and 14 June 1979, for RM53,023.54 and RM6,976.46, respectively (see AB1 at p 92), on the ground that the general power of attorney dated 14 April 1975, being exh D57, given by D1 to Ooi Kim Keat, had allegedly been revoked by the notice of revocation dated 14 February 1979, being exh D16. However, cl 26 of the power of attorney, consistently with s 161 of the Contracts Act 1950 provides that the notice of revocation, to be effective, had to be received by Ooi Kim Keat. Upon the evidence, I accept that up to 31 December 1979, Ooi Kim Keat had not received the notice of revocation. I therefore find, as a fact, that Ooi Kim Keat was authorized to sign both the receipts on behalf of D1.

It follows, therefore, and I so find, that:

(1) the parties to the joint-venture agreement were free to assign their rights and obligations thereunder; and
(2) the assignment agreement was made for the stipulated consideration of RM60,000, which D1 had duly received in full from D2.

The assignment agreement was thus perfectly valid in law, and I so hold.

Consequently, I must also hold that D1 had no right to rescind the assignment agreement and therefore, it is unnecessary for me to consider the further submission of counsel for D2 that the notice of rescission of the assignment agreement sent by D1 to D2 was ineffective because it was never proved that such notice was received by D2 but, had it been necessary for me to do so, I would hold that there was no evidence or no sufficient evidence of such receipt. And, that in any event, such notice ought to have been, but was not served upon the receivers and managers of D2.

If, contrary to my view, upon a proper construction of the joint-venture agreement, and in particular cl 22 thereof, the parties thereto were not at liberty to assign their rights thereunder, without the express consent of the other, as contended by counsel for the plaintiff, then I must go on to consider whether Tan Ah Chim, and therefore, the plaintiff, had waived the condition against assignment or, alternatively, had by their conduct, acquiesced in D2 stepping into the shoes of D1 for the purposes of carrying out the Green Lane Project.

Now, what do waiver and acquiescence mean?

By definition, waiver is the abandonment of a right and is either express or implied; it may be implied from conduct which is inconsistent with the continuation of the right (*Keene v Biscoe*[6] at p 203). A person who is entitled to the benefit of a stipulation in a contract may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waiver in this sense, depends upon consent (*Selwyn v Garfit*[7]), and the fact that the other party had acted upon it is sufficient consideration (*Re Stokoe, ex p Moore*[8]).

By definition, acquiescence is used in two senses. Strictly, it implies that a person abstains from interfering while a violation of his rights is in progress (*Duke of Leeds v Earl of Amherst*[9]). It could also imply that he refrains from seeking redress when a violation of his rights, of which he did not know at the time, is brought to his notice.

First of all, I must record my finding, that upon the evidence before me, having regard to the track record of D2 (incorporated on 16 January 1974), in regard to which extensive references have been made by counsel for D2 in his written submission at pp 8–12, D2 was and is a competent building contractor and has been and is known as such by those in the construction field in Penang, including the plaintiff.

Secondly, it was contended by counsel for D2, and I agree, that the modus operandi of D1 was to enter into joint-venture agreements with landowners and then not only to engage D2 to carry out the building construction works, but also to rely on D2 to raise the necessary finance by charging its lands to banks from time to time. This, of course, meant that

purchasers of buildings from the developer would pay the purchase price to D1 directly and he, in turn, would have to pay D2 and, it was said in passing, that as a result of such transactions, D1 owed D2 a sum amounting to RM560,000 as at 31 December 1986, which sum still remains unpaid. No less than six examples of such projects were mentioned by counsel for D2 in his written submission at pp 10–12, during the period from March 1976 to 1982.

Such a state of affairs which, objectively speaking, must appear strange to anyone with even a modicum of business acumen, is perhaps understandable, bearing in mind that D1 belonged to the old school, was the successful head of a working class Straits-born Chinese family, and was the founder of D2, who had by his side, his eldest son Ooi Kim Keat. Moreover, D1 was also, at the time the joint-venture agreement was entered into by him and Tan Ah Chim on 20 May 1977, the permanent managing director of D2, his family company, whose only activity was in the construction field.

Thirdly, I would repeat that at the time of entering into the joint-venture agreement on 20 May 1977 with D1, Tan Ah Chim was aware of the modus operandi of D1 aforesaid when engaged in joint venture projects in the construction field and, may well explain why cl 22, which allowed the assignment of rights, title and interest of the parties without qualification, had been included.

Fourthly, I must also record my finding that D2 commenced work on the Green Lane Project in August 1977 and that, as from 17 January 1979, took it over completely as evidenced by D2's circular resolution dated that day and signed by D1 in his capacity as director. I further find that, at all material times, the plaintiff was fully aware of these facts but raised no objection whatever to the works being carried out by D2, and D2 stepping into the shoes of D1, until November 1979, when the plaintiff resorted to physical force to stop D1 from proceeding with the work and, in particular, instigated the assault upon Ooi Kim Keat (DW2) on 26 November 1979, at the site, by its servant or agent. (See the medical report issued by the doctor at the Penang Medical Centre — D49.)

Fifthly, I must also record my finding that as at November 1979, D2 had done a considerable amount of work on the Green Lane Project and the expenditure incurred by it in this regard, as appears from the uncontradicted audited accounts (exh D19 at p 5) and the report of its chartered quantity surveyor, being exhs D68 and D69 (which I accept as being in no way improbable), amounted to RM440,772. This figure is also supported by D2's ledger for the period 1978–1979, being exhs D73A and D73B, which had been audited by the receivers and managers of D2, appointed by the court by order dated 13 February 1980, which show that the sum expended on the Green Lane Project by D2 amounted to RM444,209.09.

And, as for the year ended 30 September 1980, the uncontradicted audited accounts of D2 prepared by the accountants, Peter Chong, being exh D60 at p 5, which I accept as being in no way improbable, under the heading 'Work in Progess' show that the sum expended by D2 on the project amounted to RM557,813.

Similarly, the uncontradicted audited accounts of D2 prepared by the accountants, Cheah Khye Chuan, for the year ended 30 September 1985, being exh D61 at p 8 under the heading 'Development Property', which I also accept as being in no way improbable, show that the sum expended by D2 on the project amounted to RM587,778, the increase over the sum shown in the audited accounts for the year ended 30 September 1980 being attributable to outgoings.

Other evidence corroborating the fact that works on the Green Lane Project had, in fact, been carried out by D2, which was uncontradicted and which I accept as being in no way improbable, consisted of the following:

(1) a receipt dated 1 August 1979 issued by chartered architects, Yoong & Associates, in favour of D2 in the sum of RM6,050 (see exh D50);
(2) a letter dated 5 March 1980 from the consultant engineers to D2, stating their consultation fees for the Green Lane Project (see exh D51);
(3) a letter dated 29 February 1980 from consultant engineers, Jurujaya Sdn Bhd, addressed to D2, copied to JKR Penang and chartered architects, Yoong & Associates;
(4) a letter dated 3 October 1980 addressed to D2 (see exh D52);
(5) a receipt dated 31 March 1983 issued by the architects, Yoong & Associates, in favour of D2 for RM2,000 (see AB1 at p 153); and
(6) the testimony of Mr Gan Teik Chee that all works concerned were carried out by D2 as a vehicle for D1.

On the other hand, D1 did not adduce a scrap of evidence to show that he had done any work on the Green Lane Project, though counsel had, on his behalf, said that he would do so. It would be reasonable therefore, to infer that no such evidence was produced simply because there was none.

Having regard to my findings aforesaid, the plaintiff's claim that upon a proper construction of the joint-venture agreement, D1 was not entitled to transfer to D2 his right, title or interest thereunder without the consent of the plaintiff, even if well founded, was barred by waiver and acquiescence.

Before leaving this part of the case, I must advert to the attempts by counsel for the plaintiff to allege fraud, misrepresentation and manipulation of accounts against D2, by way of cross-examination of Ooi Kim Keat, which it was said was relevant as showing that the assignment agreement was not valid in law.

However, neither fraud nor misrepresentation had ever been alleged by the plaintiff in their pleadings — not even generally — although it is settled law that where it is sought to rely upon a plea based thereon, the allegations relating thereto must be pleaded and particularized, in which case, the onus lies upon the party making the allegations to prove the same beyond reasonable doubt. (See *Saminathan v Pappa*;[10] *Lee You Sin v Chong Ngo Khoon.*[11]) It is therefore right to say, at the risk of being trite, that on this ground alone, the allegations made by way of cross-examination by counsel for the plaintiff and in his submission, should be given short shrift and dismissed. But, I consider that I should go further and find as a fact, which

I hereby do, that the allegations were mere allegations and totally unsupported by the evidence.

I now turn to consider the second key issue: whether it was the plaintiff or D2 who was in breach of the joint-venture agreement.

As to question (2)

It was freely admitted by Tan Weng Joo (PW1), on behalf of the plaintiff, that the plaintiff had stopped D2 from working and indeed, had evicted D2 from the site on or about 26 November 1979, as the plaintiff had nothing to do with D2. The managing director of D2, Ooi Kim Keat, had gone further and alleged that he had been physically assaulted on that day at the site by a man with a wooden stick with nails in it, upon the instigation of the plaintiff, with a view to bringing work on the site to a standstill. He had made a prompt report to the police complaining of the assault, and was, in fact, treated at the Penang Medical Centre on that very day for injuries he said he had sustained by reason of the assault. (See the medical report dated 19 March 1986, issued by the Penang Medical Centre, being exh D49, which confirmed his admission on 26 November 1979, and that the injuries on the back of his right shoulder were consistent with their having been caused by nails.)

In his written submission, counsel for the plaintiff did not challenge the fact of the assault but chose merely to mitigate the assault by alleging that it was probably provoked by Ooi Kim Keat. There was, of course, not a scrap of evidence of such provocation, so clearly counsel's submission was based on pure surmise.

I have already found, as a fact, that a servant or agent of the plaintiff had indeed assaulted Ooi Kim Keat. I further find that the object of the assault was to bring work on the site to a standstill. My reasons for these findings are that there is nothing improbable in the testimony of Ooi Kim Keat as regards this part of the case and, I would add, he stood up well to cross-examination.

It would be convenient if, at this point, I adverted to the quarrel or falling apart, as I put it earlier, between D1 on the one side and his wife, Ong Heok (since deceased), and their children on the other side — a quarrel which revolved around their rights as directors of the family company D2, the funds and assets in it, the allotment of new shares in it, and other alleged breaches of the Companies Act 1965, which quarrel had reached the courts in the form of a civil suit, being Penang High Court Civil Suit No 66–80. Arising out of that suit, Ong Heok had, on 13 February 1980, succeeded in obtaining an ex parte interlocutory injunction restraining D1 from acting as director of D2, from dealing with the funds or using the seal of D2, or dealing in any manner with the properties or assets of D2, or otherwise interfering with the management of D2, and appointing a receiver and manager to carry out his duties until the trial of the action.

An application by motion was then made by D1 and his co-defendants to set aside the writ of summons and all subsequent proceedings for

irregularity, the real purpose of this application being to obtain an order discharging the injunction.

In the event, the application for discharge of that injunction was dismissed by Gunn Chit Tuan J (as he then was) on various grounds which appear from his judgment reported in the Malayan Law Journal under the name of *Ong Heok & Anor v Ooi Bee Tat & Ors.*[12]

Arising from all this, the point worth noting is that the receivers and managers of D2, appointed by the order of court dated 13 February 1980, had attempted to proceed with the construction work on the site, but by a letter dated 21 March 1981, addressed to their solicitors, Messrs Lim Kean Chye & Co, the plaintiff had opposed the attempt on the ground that the plaintiff had nothing to do with D2. (See AB1 at pp 140–141).

This caused Messrs Lim Kean Chye & Co to write to the solicitors for D2, Messrs Presgrave & Matthews, and to the solicitors for the plaintiff, Messrs Gan Teik Chee & Ho, a letter dated 16 May 1981 (exh D39), in the following terms:

> 16 May 1981
>
> Messrs Presgrave & Matthews
> Advocates & Solicitors
> Penang
>
> Messrs Gan Teik Chee & Ho
> Advocates & Sollcitors
> Penang
>
> Dear Sirs
>
> Ooi Bee Tat & Sons Sdn Bhd
> Proposed 25 double storey terrace houses and proposed nine double storey detached houses on Lot 70 Green Lane
>
> We shall be obliged to know what is going to happen to the proposed buildings. As you realize, the receivers and managers cannot do anything of their own will and must know your attitude, so that either one of you will apply to court for the projects to continue. Please let us have your immediate reply because there are pressing problems with the Majlis Perbandaran Pulau Pinang.
>
> Yours faithfully
> —Sgd—
> Lim Kean Chye & Co

Messrs Gan Teik Chee & Ho then replied by their letter dated 30 May 1981 (exh D40), in the following terms:

> Penang 30 May 1981
> GTC/0/90/77/LV
> DH/23
>
> Messrs Lim Kean Chye & Co
> Advocates & Solicitors
> 14 Penang Street

(Tingkat Satu)
Penang

Dear Sirs

Proposed housing scheme on Lot 70, TS5 NED Penang

With reference to your letter of 16 May 1981, our client instructs that the company has nothing to do with the above housing scheme as the joint-venture contract is between the landowners and our client Ooi Bee Tat.

Yours faithfully,
—Sgd—
Gan Teik Chee & Ho

Messrs Presgrave & Matthew
Advocates & Solicitors
Penang

Tan Ah Chim & Sons Sdn Bhd
42, Green Lane TS5
Penang

As a result, Messrs Lim Kean Chye & Co, as solicitors for the receivers and managers of D2, had applied to the High Court, Penang, seeking directions as to the Green Lane Project, the subject matter of the joint-venture agreement.

Upon the hearing of this application on 20 September 1982, wherein the receivers and managers of D2 were represented by Mr Lim Kean Chye, D1 by Mr Gan Teik Chee and D2 by Mr NG Sivanandhan, Gunn Chit Tuan J (as he then was) ordered that D2 was to continue the construction work on the Green Lane Project.

Notwithstanding that order of court, the plaintiff had refused to allow the receivers and managers of D2 to continue with the construction work on the Green Lane Project and Mr Gan Teik Chee had continued to act for D1 in the matter of the settlement agreement in writing dated 20 July 1982 (AB1 at p 142), entered into by the plaintiff and D1, whereby D1 was to carry out the Green Lane Project himself and that, for this purpose, time for completing the same as provided for in the joint-venture agreement be extended by a period of two years, and that all claims arising from disputes between the plaintiff and D1 be settled in consideration of the payment by D1 to the plaintiff of the sum of RM250,000. D2 was kept in the dark about this settlement agreement.

Clearly, the settlement agreement of 20 July 1982 was inconsistent with the order of Gunn Chit Tuan J (as he then was) dated 20 September 1982, whereby D2 had been authorized to continue with the construction work on the Green Lane Project.

Although Mr Gan Teik Chee had appeared only on behalf of D1 at the hearing before Gunn Chit Tuan J (as he then was) on 20 September 1982 when the order was made, there is, nevertheless, the evidence of the managing director of the plaintiff, Mr Tan Weng Joo, that he (Mr Gan Teik

Chee) had, in 1982 and 1983, been advising the plaintiff in the matter of the settlement agreement dated 20 July 1982 (AB1 at p 142). His evidence on this point is corroborated by the letter (P31) dated 6 October 1982, signed by Mr Gan Teik Chee and addressed to the plaintiff which reads as follows:

> 6 October 1982 AR Registered
> GTC/0/90/77/G
>
> Tan Ah Chim & Sons Sdn Bhd
> No 42 Green Lane (TS5)
> Penang.
> Attention: Mr Tan Weng Joo
>
> Dear Sirs
>
> Sale agreement dated 20 May 1977 in respect of Lot 70 Town Subdivision 5, North East District Penang
>
> We refer to the above matter and your letter of 20 July 1982 to Mr Ooi Bee Tat @ Ooi Bee Lee, regarding which you promised to let us have a certified copy of the resolution authorizing the settlement of the dispute in respect of the above sale agreement.
>
> Please let us have a certified copy of the above resolution as soon as possible.
>
> Yours faithfully,
> —Sgd—
> Gan Teik Chee & Co
>
> cc Mr Ooi Bee Tat @ Ooi Bee Lee
> No 136–E Jalan Rambutan
> Air Itam
> Penang

Having regard to this evidence, it was contended by counsel for D2 that Mr Gan Teik Chee, who had acted for D1 in the matter of the settlement agreement dated 20 July 1982 (AB1 at p 142), entered into by the plaintiff and D1, ought to have informed the plaintiff of the order of Gunn Chit Tuan J (as he then was) dated 20 September 1982, whereby D2 had been authorized to carry on the Green Lane Project.

Mr Gan Teik Chee, who was called by D2, said that he was under no duty to inform the plaintiff as aforesaid. In my view, he was under such a duty as an officer of the court. The settlement agreement was overridden by the order of the court dated 20 September 1982, made in proceedings in which Mr Gan Teik Chee had represented D1.

Although the plaintiff's case was that it did not know of the order of court dated 20 September 1982 at the material time, the knowledge of their solicitor Mr Gan Teik Chee of the same, must be imputed to the plaintiff. (See *Doshi v Yeoh Tiong Lay*[13] at p 88.)

The point about which complaint had been made by counsel for D2 is that, notwithstanding the order of court dated 20 September 1982, the plaintiff and D1 continued to deal with each other with a view to D1

carrying out the construction works on the Green Lane Project. It seemed to me that counsel had considerable justification to do so, as a prima facie case of contempt of court was made out.

There is another point which has occurred to me regarding this part of the case and this is that, there appears to be nothing in the judgment of Gunn Chit Tuan J (as he then was) referred to earlier, to suggest that Mr Gan Teik Chee, who appeared before him on behalf of D1 in the proceedings held on 20 September 1982 which led to that judgment, had directed the attention of the court to the existence of the settlement agreement dated 20 July 1982, entered into by the plaintiff and D1. If, in fact, there was no such disclosure, then in my view, the non-disclosure was in respect of a matter which was material for the court to know. I say nothing more about the matter as it does not appear that Mr Gan Teik Chee had been cross-examined on this point.

In my view, the settlement agreement — which incidentally, fell through because of the inability of D1 to fulfil his financial obligations thereunder, though D1 sought to camouflage this by the excuse that there was no resolution by the plaintiff's board authorizing the settlement — was nothing more than a concerted attempt by the plaintiff and D1 to exclude D2 from the Green Lane Project, in contravention of the assignment agreement entered into by D1 and D2. I therefore do not consider that what counsel for the plaintiff has termed 'the admission therein (the settlement agreement) that D1 was in breach of the 1977 agreement for which the RM250,000 was to be paid by way of damages', should be given any weight at all. In any event, the so-called admission was in no way binding upon D2 who was not a party to the settlement agreement.

I must next mention the final order dated 25 January 1983, made in Civil Suit No 66–80 (AB1 at p 149), in particular cl 5 thereof, which provided that the appointment of the receivers and managers shall continue until the EGM of D2. Pursuant to this part of the final order, an EGM of D2 was held on 1 March 1983, whereat it was resolved, inter alia, that the receivers and managers be requested to return the management of the affairs of D2 to its board.

Following the EGM of 1 March 1983, D2 wrote a letter dated 11 June 1983 to the plaintiff, requesting the plaintiff to allow D2 to complete the building project and, at the same time, mentioning that D2, in furtherance of its desire to complete the project, had on 31 March 1983 paid the fees of the chartered architects, Yoong & Associates (see AB1 at pp 154–155), and had also, on 11 June 1983, written to D1, inviting his co-operation as a director of D2 (as appears in AB1 at pp 156–157), but to no effect.

Then, on 4 September 1984, the High Court, Penang, entered a consent order in Civil Suit No 66–80, whereby it was ordered that D1 do relinquish his position as permanent managing director of D2 and do refrain from interfering in the management and business activities of D2. (See AB1 at pp 156–157.) However, D1 chose to ignore the same, as emphasized by the position he has taken in the present proceedings.

It would be convenient if, at this stage, I referred to the obligations of the parties under the joint-venture agreement in broad outline.

The building scheme in the Green Lane Project was to be carried out in two phases — phase 1 to be completed within 18 months of vacant possession being given of the lands comprised therein, and Phase 2 to be completed within 18 months of vacant possession being given of the lands comprised therein. (See AB1 at pp 7–8 cll 8–10.)

On the other hand, the plaintiff's obligation was to give vacant possession of the lands comprised in phase 1 within 18 months of the date of the joint-venture agreement, that is to say, on or before 20 November 1978, and vacant possession of the lands comprised in phase 2 within 30 months of the date of the joint-venture agreement, that is to say, on or before 20 November 1979.

In order to give vacant possession of the lands comprised in phases 1 and 2 as aforesaid, the plaintiff had incurred the obligation of clearing certain occupants on the lands by the payment of compensation.

In the event, as was admitted by Mr Tan Weng Joo on behalf of the plaintiff, vacant possession was never given by the plaintiff as required under the joint-venture agreement; he admitted that in so far as phase 1 was concerned, it was given only as late as 3 April 1981.

In this context, it is worth noting that by the consent order dated 15 October 1980 (see AB1 at pp 138–139), delivery of vacant possession was to be effected on or before 15 April 1981.

Other admissions by Tan Weng Joo worth mentioning are that in November 1979, the plaintiff, by its servants or agents, had prevented D2 from carrying on the building works and, subsequently, between 1980 and 1983, continued to prevent the receivers and managers of D2 from doing so, and after 11 June 1983, had continued to prevent D2 from doing so.

D1's version regarding this part of the case was this. Tan Ah Chim had wanted construction works on phase 1 to commence in August 1977 and had affirmed his intention to give vacant possession as required under the joint-venture agreement. This necessitated clearing nine occupants on the land. However, by 15 July 1981, there were still occupants on the land (see exh D4) and the position was complicated by the presence of a wooden hut on the land constructed by a relative of Tan Ah Chim. Then, sometime in 1982, Tan Ah Chim died.

It was argued by counsel for the plaintiff that there was a waiver of the requirement under the joint-venture agreement as to the giving of vacant possession of the lands concerned by the plaintiff when D1 proceeded with the construction work before the plaintiff yielded vacant possession of the site.

In this context, it is useful to bear in mind what Isaacs J said in *Craine v Colonial Mutual Fire Insurance Co Ltd*:[14]

> ... we are bound here to limit the word 'waiver' to its own strict legal connotation. 'A waiver must be an intentional act with knowledge' (per Lord Chelmsford LC in *Earl of Darnley v (Proprietors etc) of London, Chatham & Dover Railway* (1867) LR 2 HL 43 at p 57). First, 'some distinct act ought to be done to constitute a waiver' (per Parke B in *Doe d Nash v Birch* [1836] 1 M & W 402 at p 406 and

per Williams J in *Perry v Davis* (1858) 3 CB NS 769 at p 777); next, it must be 'intentional', that is, such a either expressly or by imputation of law indicates intention to treat the matter as if the condition did not exist or as if the forfeiture or breach of condition had not occurred; and, lastly, it must be 'with knowledge', an essential supported by many authorities, from *Pennant's* case (1596) 2 Co Rep 171 at p 173 and down to *Matthews v Smallwood* [1910] 1 Ch 777. 'Waiver' is a doctrine of some arbitrariness introduced by the law to prevent a man in certain circumstances from taking up two inconsistent positions (see per James LJ in *Pilcher v Rawlins* (1872) 7 Ch App 259 at p 268 et seq). It is a conclusion of law when the necessary facts are established. It looks, however, chiefly to the conduct and position of the person who is said to have waived, in order to see whether he has 'approbated so as to prevent him from reprobating' — in English terms, whether he has elected to get some advantage to which he should not otherwise have been entitled, so as to deny to him a later election to the contrary (see per Lord Shah in *Pitman v Crum Ewing* [1911] AC 217 at p 239). His knowledge is necessary, or he cannot be said to have approbated or elected.

Counsel for D1 had argued that by commencing work before vacant possession of the site was given, D1 had not intended to waive or, perhaps more accurately, he had never intended to release Tan Ah Chim and it follows, his successor-in-title, the plaintiff, from the obligation to provide vacant possession of the lands concerned within the time limited under the joint-venture agreement. In particular, it was argued that D1's intention was merely to expedite progress of the construction works and that he did so at the behest of Tan Ah Chim; in other words, D1 never intended to throw away his rights under the joint-venture agreement.

Considering that it was admitted by the plaintiff that relations between Tan Ah Chim and D1 were more than cordial, I am inclined to agree with this part of the submissions of counsel for D1. Accordingly, applying the principles enunciated by Isaacs J in *Craine v Colonial Mutual Fire Insurance Co Ltd*,[14] I hold that there was no waiver as contended for on behalf of the plaintiff because D1 never intended to release or not to assert his right.

I would, at this stage, touch upon the notice issued by the building department of the Majlis Perbandaran Pulau Pinang (AB1 at p 35), dated 23 January 1979, addressed to the contractor on site, requiring the stoppage of construction work on the Green Lane Project because there were no approved building plans. In fact, however, building plans had been approved on 10 December 1976 and 3 October 1978 (see D48A, D48C and D48D) and, according to Ooi Kim Keat, whose evidence on this point I accept, when this was explained to the officer who issued the notice, one Mr Chooi, the latter indicated construction work on the project could proceed. Nothing therefore, turns on the notice issued by the building department of the Majlis Perbandaran Pulau Pinang.

Next, I would touch upon the plaintiff's allegation that the building works carried out on the Green Lane Project were seriously defective. I note, however, that no evidence whatsoever had been adduced on behalf of the plaintiff in support of this averment, although counsel for the plaintiff had categorically stated that he would be calling expert evidence in support of the same. The only other point worth mentioning, as regards this part of the case, is the letter of complaint by the consultant engineers dated 22 January

1979 (AB1 at p 34) but this related merely to 'form work', which was, in fact, subsequently replaced.

Nor, for that matter, did the plaintiff adduce any evidence, for example, by the calling of experts to prove its allegation that it had suffered damage by reason of the alleged breaches by the defendants or either of them (see *Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd*[15]).

It was perfectly obvious, therefore, that the plaintiff was in breach of contract from beginning to end and was wholly to blame for causing construction work on the Green Lane Project to grind to a halt and I so find.

So far as the plaintiff's claims against D1 are concerned, regard must *also* be had to my conclusions as to the interpretation of cl 22 of the joint-venture agreement and the validity of the assignment agreement, whereby D1 had assigned his rights and obligations under the joint-venture agreement to D2. That being so, s 42 of the Contract Act 1950, which provides that, 'When the promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor', applies in favour of D1. (See *Letchumi Ammal v Nam Fong Housing Sdn Bhd.*[16]) The plaintiff's claims against D1 must, therefore, be dismissed with costs and I so order.

For the same reasons, D1's counterclaim against the plaintiff has no legal basis and must also be dismissed but with no order as to costs, since I consider that a great deal of the court's time was taken up in considering issues which eventually were decided against the plaintiff.

So far as the plaintiff's claims against D2 are concerned, it goes without saying that, having found that there was a valid assignment by D1 to D2 of his obligations under the joint-venture agreement, and having found that the plaintiff was in breach of contract from beginning to end and was wholly to blame for causing the construction work on the Green Lane Project to grind to a halt, its claims against D2 must likewise be dismissed with costs, and I so order.

I must now consider the counterclaim of D2 against the plaintiff to which I have made reference earlier on in this judgment.

First of all, it would be pertinent to refer to the following provisions of the Specific Relief Act 1950, which deserve reproduction in full:

> 11 (1) Except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the court, be enforced—
>
> (a) when the act agreed to be done is in the performance, wholly or partly, of a trust;
> (b) when there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done;
> (c) when the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief; or
> (d) when it is probable that pecuniary compensation cannot be got for the non-performance of the act agreed to be done.
>
> (2) Unless and until the contrary is proved, the court shall presume that the breach of a contract to transfer immovable property cannot be adequately

relieved by compensation in money, and that the breach of a contract to transfer movable property can be thus relieved.

...

18 (1) Any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for, performance.

(2) If in any such suit the court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.

(3) If in any such suit the court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

...

20 (1) The following contracts cannot be specifically enforced:

(a) a contract for the non-performance of which compensation in money is an adequate relief;

(b) a contract which runs into such minute or numerous details, or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the court cannot enforce specific performance of its material terms;

(c) a contract the terms of which the court cannot find with reasonable certainty;

(d) a contract which is in its nature revocable;

(e) a contract made by trustees either in excess of their powers or in breach of their trust;

(f) a contract made by or on behalf of a corporation or public company created for special purposes, or by the promoters of the company, which is in excess of its powers;

(g) a contract the performance of which involves the performance of a continuous duty extending over a longer period than three years from its date; and

(h) a contract of which a material part of the subject-matter supposed by both parties to exist, has, before it has been made, ceased to exist.

(2) Save as provided by the law relating to civil procedure, no contract to refer a controversy to arbitration shall be specifically enforced.

21 (1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant any such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.

(2) The following are cases in which the court may properly exercise a discretion not to decree specific performance:

(a) where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant,

though there may be no fraud or misrepresentation on the plaintiff's part; and

(b) where the performance of a contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff.

(3) A case in which the court may properly exercise a discretion to decree specific performance is where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

22 Except as otherwise provided by this Chapter, the specific performance of a contract may be obtained by—

(a) any party thereto;
(b) the representative in interest, or the principal, of any party thereto:

Provided that, where the learning, skill, solvency, or any personal quality of the party is a material ingredient in the contract, or where the contract provides that his interest shall not be assigned, his representative in interest or his principal shall not be entitled to specific performance of the contract, unless where his part thereof has already been performed;

...

In *Oon Hock Lai & Anor v Lee Kok Leong*,[17] which was a purchaser's action for specific performance of a contract for the sale of land and the construction of a house thereon, where each party blamed the other for having committed a breach of contract by the defendant, Lim Beng Choon J had occasion to consider most of the provisions aforesaid, and having scrutinized the evidence with a view to determining the nature of the breaches alleged, the circumstances under which the alleged breaches occurred and whether it was the plaintiff's act or conduct that had evinced an intention not to be bound by the agreement, concluded that the plaintiff was entitled to an order for specific peformance *and damages* and a declaration that the defendant's purported rescission of the contract was null and void.

Jones and Goodhart on Specific Performance (1986) at p 20 have this to say:

> The mere fact that a contract contains a liquidated damages clause, or a clause of a similar nature, is not generally an admission that damages are an adequate remedy or that one party has an option to pay or perform (see *Howard v Hopkyns* (1742) 2 Atk 371; *Crutchley v Jerningham* (1817) 2 Mer 502; *Long v Bowring* (1864) 33 Beav 585; *Robb v Green* (1895) 2 QB 315). Exceptionally, the court may reach the opposite conclusion: *Leogh v Lillie* (1860) 6 H & N 165; specific performance will nonetheless be granted if it is the appropriate remedy. Conversely, if the parties stipulate that specific relief should be the remedy, it is a recognition that they regard damages as inadequate; but this does not oust the court's discretion to refuse specific relief if it thinks damages are in fact an adequate remedy. (See *Warner Bros v Nelson* [1937] 1 KB 209 at pp 220–221, per Branson J.)

In principle, therefore, the court has a discretion to order specific performance *and* decree damages in favour of a party. Land is always deemed to have a special value of loss, which may not be adequately compensated by damages. The evidence adduced also discloses that D2 had put in a tremendous

amount of work and labour and also expended considerable sums of money in discharge of its obligations under the joint-venture agreement until they were wrongfully and without just cause excluded from the site by force of arms, as it were, by agents or servants of the plaintiff. There is, therefore, considerable justification for invoking the doctrine of substantial performance in favour of D2, and I so hold.

In *Jania Beevi v Govindaswami*,[18] it was held that where the subject matter of the agreement consisted of a partly completed building and the agreement itself did not contain specific details relating to the proposed construction, the court might grant specific relief.

In *Kow Lup Piow & Ors v Lee Soh Hua*,[19] a purchaser's action for specific performance in respect of a contract for the sale and purchase of land at a price of RM700,000 which the plaintiff had intended to develop, the High Court, apart from decreeing specific performance, had ordered the defendant to pay RM50,000 damages for wrongful termination of the contract after taking into consideration the fact that it was well over five years since the defendant broke the contract, thus bringing the plaintiff's development project to a standstill for several years.

In all circumstances, I consider that this is an appropriate case where I must not only decree specific performance but also award compensatory damages, in favour of D2.

More particularly, as regards relief by way of specific performance and injunction I decree in favour of D2 against the plaintiff as follows:

(1) an order for specific performance requiring the plaintiff to carry out the terms and conditions of the joint-venture agreement and, in furtherance thereof, to permit D2, as successor-in-title and/or assignee of D1 thereunder, to carry out its obligations and to invoke its rights thereunder; and

(2) an injunction restraining the plaintiff, by itself, its members, servants or agents, from preventing or interfering with the construction work or any part thereof to be continued by D2, its members, servants or agents.

I next turn to consider the quantum of damages, both actual and consequential, which I should decree in favour of D2 against the plaintiff.

In assessing the quantum of damages, I must fall back on the broad fundamental principles as to damages enunciated by Lord Blackburn 112 years ago in *Livingstone v Rawyards Coal Co*[20] who said that the measure of damages is '... that sum of money which will put the party who has suffered, in the same position he would have been if he had not sustained the wrong for which he is getting the compensation or reparation'.

Secondly, I must consider the question what is, the material date at which damages fall to be assessed; is it the date of the breach or the date of the hearing? Since an integral part of the joint-venture agreement concerned land and the construction of dwelling houses and shophouses thereon, and as D2 had refused to accept the plaintiff's wrongful repudiation but chose to keep the contract open and alive, it would be obviously unjust to assess

damages at the date of the breach. Instead, I would adopt the date of the hearing as the appropriate date for the assessment of damages. (See *Johnson v Agnew*[21] per Lord Wilberforce at p 401A–C; *Radford v De Froberville*.[22])

Thirdly, I have kept in the forefront of my mind certain well-established principles in the field of building contract claims; they are conveniently distilled for me by Prof Vincent Powell-Smith and John Sims in their well-regarded book, *Building Contract Claims* (2nd Ed), at pp 136, 137 and 144 as follows:

(1) Loss of profit normally to be expected, which the contractor would otherwise have earned but for the delay or disruption, is an allowable head of claim under the rule in *Hadley v Baxendale*.[23]
(2) However, a contractor would not be entitled to recover an exceptionally high profit on another contract unless this fact were known to the employer at the time the delayed or disrupted contract had been entered into. (See *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd*.[24])
(3) Additional expenditure on labour, materials or plant due to increases in cost during a period of delay is an allowable head of claim.
(4) The correct measure would be the difference between what the contractor would have spent on labour, materials and plant and what he has actually had to spend over the whole period of the work as a result of the delay and disruption concerned.

Also relevant to this part of the case is what Megaw J (as he then was) said in *Wraight Ltd v PH & T (Holdings) Ltd*,[25] a case where a contractor had made a successful claim for loss of profit:

> In my judgment, the position is this: prima facie, the claimants are entitled to recover, as being direct loss and/or damage, those sums of money which they would have made if the contract had been performed, less the money which has been saved to them because of the disappearance of their contractual obligation.

Commenting on this passage in the judgment of Megaw J, Vincent Powell-Smith and John Sims have this to say at p 137 of their book:

> The judge's reference to 'those sums of money which they would have made' is important, since it shows that what is recoverable is the actual profit on the particular contract, whether that is a greater or lesser profit than might normally be anticipated in the industry at large.

I now turn to examine the expert evidence adduced on behalf of D2 on the question of quantum.

As regards the quantum of damages sought by D2 against the plaintiff under its counterclaim, D2 had relied upon the reports of its chartered quantity surveyor, Mr Saw Soon Kooi of Kuantitibina Sdn Bhd (D69 dated 14 August 1991), and registered valuer, Mr Long Tian Chek of KGV & Associates (AB2 at pp 112–127, dated 21 August 1985), which had been included in the agreed bundle of documents, subject to cross-examination. In the event, these experts were called and cross-examined by counsel for the plaintiff but they emerged unscathed and their evidence uncontradicted.

On the other hand, for the plaintiff, neither expert reports nor expert oral evidence had been adduced, although counsel for the plaintiff did say that expert evidence would be called.

D2's quantity surveyor was undoubtedly competent in his field, for he was not only well qualified but also highly experienced. His terms of reference appear in D68 at pp 3 and 10 and in D69 at paras 1–2.

He stated that he had visited the site between 15 July 1985 to 3 August 1985 and again on 14 July 1991.

He estimated the costs of completing the works as at June 1991 at RM2,110,080.

He concluded, for reasons which appear sufficiently in his report, D68 at pp 3 and 10 and in D69 paras 1–2, that the estimated cost of completing the works, including remedial works, as at June 1991 was RM2,110,080.

Similarly, D2's chartered valuer, Mr Long Tian Chek, concluded for reasons which appear sufficiently in his main report (AB2 at pp 121– 122), that the total value of the houses and shophouses on completion as at 1 June 1991 was RM6,245,000. (See also his supplementary valuation report dated 21 August 1985 (D75).)

I accept the testimony of both D2's chartered surveyor, Mr Saw Soon Kooi, and chartered valuer, Mr Long Tian Chek, as well as their reports, as the same were uncontradicted and they stood up well to cross-examination. Moreover, I found nothing improbable either in their testimony or their reports.

More particularly, as regards reliefs by way of damages, both actual and consequential, I decree in favour of D2 against the plaintiff as follows:

(i) The cost to complete the project in June 1991 including the remedial works (see D69 at p 3):	RM2,110,080.00
Less Had vacant possession been given by the plaintiff in accordance with the joint-venture agreement, without interruption of work, the project would probably have been completed in 1980 (See D68 at p 29 para 10.01), in which case the costs would have amounted to:	RM1,213,972.68
	RM 896,107.32
Add	
(ii) The prices which the houses and shophouses (only 28 of which D2 would be entitled to under the joint-venture agreement) would most probably have fetched in 1980 (see the valuer's main report, AB2 at124):	RM6,082,000.00
Less Had vacant possession been given by the plaintiff in accordance with the joint-venture agreement, without interruption of work, the project would	

most probably have been completed in 1980 and the cost would most probably have been (which sum includes the sum of RM557,813 mentioned at p 5 of exh D60, less RM60,000, being the consideration under the assignment agreement paid by D2 to D1): RM1,213,972.86

RM4,868,027.14

I next turn to consider D2's claim for interest on damages against the plaintiff.

The statutory power of the court to award interest is governed by s 11 of the Civil Law Act 1956, which is as follows:

> In any proceedings tried in any Court for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:
>
> Provided that nothing in this section—
>
> (a) shall authorise the giving of interest upon interest;
> (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or
> (c) shall affect the damages recoverable for the dishonour of a bill of exchange.

The principle underlying the award of interest is not to compensate a plaintiff for any damage done, but for him being kept out of his money (see *London, Chatham & Dover Railway Co v South Eastern Railway Co*[26]).

As to the appropriate rate of interest, as I noted in my judgment in *Lim Yak Hua v Eastern & Oriental Hotel [1951] Sdn Bhd*,[27] there are several different rates to choose from depending upon the particular circumstances of each case. In the present case, D2 had chosen the judgment debt rate of 8%pa. So far as the claim for interest on damages for the pre-judgment period is concerned, counsel for the plaintiff has chosen to say nothing as regards this issue.

I consider that the judgment debt rate of 8%pa chosen by D2 for the pre-judgment period is not an unreasonable one and I therefore adopt the same.

The next question is, what is the pre-judgment period for which interest should be paid. This period, according to D2 should commence from 1 January 1981, since the expert evidence adduced by D2 established that, had vacant possession been given by the plaintiff in accordance with the joint-venture agreement, and had there been no interruption of work, the project would probably have been completed by the end of 1980. I accept this expert evidence as it was uncontradicted and I found nothing improbable in it.

In the circumstances, I hold that pursuant to s 11 of the Civil Law Act 1956, D2 is entitled to recover interest on the damages aforesaid at the rate of 8%pa from 1 January 1981 to the date of judgment and, pursuant to O 42 r 12 of the Rules of the High Court 1980, further interest thereon at the

aforesaid rate from the date of judgment to the date of payment, and I so order.

Finally, the plaintiff must also pay to D2 the costs of the action.

Having heard leading counsel for D2 and the plaintiff further, I made a consequential order allowing D2 18 months from the date of approval of building plans by the relevant authorities or from the date when the vacant possession of the sites concerned are given by the plaintiff to D2, whichever is the later, in order to complete the project pursuant to the joint-venture agreement.

By way of postlude, I must mention that as soon as I had read out my draft judgment, and made the consequential order aforesaid in favour of D2, leading counsel for the plaintiff had submitted that the court had not taken into account the fact that specific performance having been decreed in favour of D2 against the plaintiff, D2 will be completing the dwelling houses and selling them at present market values.

To emphasize the point, he added that on the other hand, the court had taken into account the difference in the cost of construction, ie the RM896,107.32, to determine loss of profits incurred by D2.

What counsel was driving at was that in assessing D2's claim for loss of profits, there should be brought into account the profits expected to be earned when the dwelling houses are eventually completed and sold, it being *assumed* that such sales would fetch higher profits than would have been the case, had D2 not sustained the wrong for which he is getting compensation or reparation.

He therefore prayed that the court direct an enquiry as to damages be held to take into account the above point.

Leading counsel for D2 replied that no evidence had been called by the plaintiff to support the point now raised by leading counsel for the plaintiff and the court could not speculate as to the present selling prices of the dwelling houses.

Junior counsel for D2 submitted that, unlike leading counsel for D2 at the trial, counsel for the plaintiff had made no attempt at all to deal with the issue of quantum of damages in his written submissions.

Now, the record of proceedings will show that extensive evidence was adduced on behalf of D2 in the shape of testimony and reports from the quantity surveyor, Mr Saw Soon Kooi, and the registered valuer, Mr Long Tian Chek, yet at no time when they were in the witness box was a single question put to either witness to establish at what prices the buildings concerned might have been sold, having regard to the current market prices. Nor, for that matter, was any expert evidence adduced on behalf of the plaintiff on this point, although counsel for D2 had categorically stated that he would be calling expert evidence on the quantum of damages and, indeed, counsel for D2 had, in his written submission, directed the attention of the court to this glaring omission. Similarly, in his lengthy written submission, counsel for the plaintiff had omitted to deal with the point. It was therefore, only after I had read out my draft judgment that, for the first

time, counsel for the plaintif sought an order for an enquiry as to damages with a view to establishing the point. The question therefore, was whether he should be allowed to do so at this very late stage.

It was manifestly clear, that there had been ample opportunity for the plaintiff to elicit the point concerned either by way of cross-examination of D2's experts or by adducing evidence in rebuttal in the shape of expert testimony, yet advantage was not taken of that opportunity. To have granted the request of counsel for the plaintiff would have led to an unnecessary prolongation of what was already a lengthy trial, with a consequent increase in costs and would have meant giving the plaintiff a second opportunity to prove a point which it had failed to do at the trial.

Furthermore, if the plaintiff was to be permitted to make further investigations and to call further evidence after the court has pronounced judgment on *all* issues before it, then the rules of procedure would become nugatory.

Accordingly, having considered the submissions of counsel on both sides and the various factors above-stated, I had, in the exercise of my discretion, refused to accede to the request of leading counsel for the plaintiff.

Order accordingly.

Reported by Prof Vincent Powell-Smith